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IN THE

Supreme Court of the United States

OCTOBER TERM 1992

LEONARD NOBLEMAN, ET UX
Petitioner

v.

AMERICAN SAVINGS BANK,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF NATIONSBANC MORTGAGE CORPORATION AMICUS CURIAE IN SUPPORT OF RESPONDENT

MICHAEL C. BARRETT*
MARY A. DAFFIN
G. TOMMY BASTIAN
6750 Hillcrest Plaza Dr.
Suite 313
Dallas, Texas 75230
(214) 386-5040

ERIN BAKER SHANK
NationsBank of Texas
1201 Main Street, 29th Floor
Dallas, Texas 75202

CAREN CASTLE
AUDIE HAMPTON
1099 18th Street Suite 2200
Denver, Colorado 80202
(303) 299-1800

*Counsel of Record

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF NATIONSBANC MORTGAGE CORPORATION

Amicus respectfully moves this Court for leave to file the attached brief.

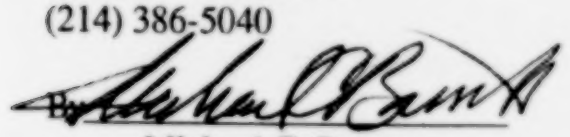
Nationsbanc Mortgage Corporation is a nationwide mortgage originator and servicer having over two thousand employees in one hundred ten locations. The company now services nearly one-half million single family residential home loans having a value of over thirty billion dollars. Between June of 1991 and June of 1992 the company originated over fifty-four thousand mortgages and represented over thirteen hundred investors including the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Government

National Mortgage Association. As one of the nation's largest financial institutions, Nationsbanc is vitally affected by the issues before the Court.

The annexed brief argues that 11 U.S.C.A. 1322(b)(2) specifically provides that home mortgages may not be bifurcated into secured and unsecured portions.

Respectfully submitted,

BARRETT BURKE WILSON
CASTLE DAFFIN &
FRAPPIER, L.L.P. 6750
Hillcrest Plaza Dr.
Suite 313
Dallas, Texas 75230
(214) 386-5040

By: 
Michael C. Barrett

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INTEREST OF THE AMICUS

NationsBanc Mortgage Corporation ("Nationsbanc") is vitally interested in the result reached by the Supreme Court in the case at bar. The company's portfolio of home mortgage loans is extremely large and spread throughout the nation. Its interest in providing funding for single family home mortgage lending is dramatically affected when mortgages in one region of the nation are impacted by judicial positions which differ radically from those in other regions.

Further, Nationsbanc must consider the inherent risk associated with any lending activity in the light of the potential impact of the United States Bankruptcy Code. The current uncertainty renders risk underwriting in this area extremely difficult. Given the vastly different economic consequence between a reversal of the Fifth Circuit and an affirmance on the entire future underwriting process, Nationsbanc seeks to obtain a result which would continue to support the expansion and development of the American home loan industry and allow for the broadest and most inclusive underwriting criteria. An adverse result, overruling the Fifth Circuit, would, conversely, limit and restrict the underwriting process, and make residential mortgage lending a far more risk intensive pursuit.

Nationsbanc seeks to persuade this Court to hold in a manner which would promote the ability of the American mortgage industry to extend its services to the broadest possible portion of the population and to advance the principles of the National Housing Act which lie at the very core of American society.

SUMMARY OF ARGUMENT

NationsBanc Mortgage Corporation takes the position that a Chapter 13 Debtor should not be permitted to bifurcate a claim secured only by the principal residence into a secured and unsecured portion. In accordance with 11 U.S.C. Section 1322(b)(2), claims of this nature may not be modified. Bifurcation of claims secured only by the principle residence is inconsistent with the plain statutory language, standard principles of statutory construction and legislative history of section 1322(b)(2).

This Court's ruling in Dewsnup v. Timm compels a conclusion that Chapter 13 debtors cannot "cram down" a home mortgage loan. Further, this Court is compelled to construe and apply the United States Bankruptcy Code consistently with the National Housing Act.

ARGUMENT

I. THE PLAIN STATUTORY LANGUAGE, STANDARD PRINCIPLES OF STATUTORY CONSTRUCTION AND LEGISLATIVE HISTORY OF THE BANKRUPTCY CODE PROHIBIT BIFURCATION OF A CLAIM SECURED ONLY BY A SECURITY INTEREST IN REAL PROPERTY THAT IS THE DEBTOR'S PRINCIPAL RESIDENCE.

Bifurcation of a secured claim on real property that is the debtor's principal residence violates Section 1322(b)(2) of the Bankruptcy Code because: (1) the plain meaning of Section 1322(b)(2) prohibits such a modification; (2) principles of statutory construction dictate that secured claims held by a home mortgage lender not be modified; and (3) the legislative history confirms that claims secured by the principal residence may not be modified.

Modification of home mortgages clearly was not intended by Congress. A fair reading and interpretation of the statute and concomitant history lead to no other conclusion.

A. The Plain Meaning of Section 1322(b)(2) Precludes Bifurcation of a Claim Held by a Home Mortgage Lender.

Section 1322(b)(2) of Title 11 allows the Chapter 13 debtor's

plan to modify the rights of holders of secured claims, other than a claim secured by a security interest in real property that is the debtor's principal residence. The plain, clear meaning of Section 1322(b)(2) prohibits modification of a claim secured only by the principal residence. In United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989), this Court held that "[t]he plain meaning of legislation should be conclusive except in the rare case [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters."

B. Principles of Statutory Construction Dictate that the Claim of a Home Mortgage Lender not be Bifurcated.

Section 1322(b)(2) of the Bankruptcy Code provides special protection for a lender that holds a claim secured by the Debtor's principal residence:

> Subject to Section (a) and (c) of this section, the plan may . . . (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of a claim;

11 U.S.C. Section 1322(b)(2) (emphasis added). The interpretation of Section 1322(b)(2) that is consistent with the plain language of the statute, with principles of statutory construction, with legislative history, and with the structure and purpose of the statute as a whole, affords protection to the entire amount of the debt owed to the home mortgage lender. This approach was applied by the Courts In re Russell, 93 B.R. 703 (D.N.D. 1988); In re Chavez, 117 B.R. 733 (Bankr. S.D. Fla. 1990); In re Sauber, 115 B.R. 197 (Bankr. D. Minn. 1990); In re Schum, 112 B.R. 159 (Bankr. N.D. Tex. 1990); In re Kaczmarczyk, 107 B.R. 200 (Bankr. D. Neb. 1989); In re Roberts, 99 B.R. 653 (Bankr. W.D. Pa. 1989); In re Catlin, 81 B.R. 522 (Bankr. D. Minn. 1987); In re Hynson, 66 B.R. 246 (Bankr. D.N.J. 1986); and In re Smith, 63 B.R. 15 (Bankr. D.N.J. 1986).

One of the primary tenets of statutory construction is that the words of the statute as "the primary, and ordinarily the most reliable, source of interpreting its meaning." In re Chavez, 117 B.R. 733, 735 (Bankr. S.D. Fla. 1990) (quoting Watt v. Alaska, 451 U.S. 259, 266 N.9 (1981). The language of Section 1322(b)(2) does not limit a creditor's protection to the rights relating to the secured portion of a residential mortgage. Instead, Section 1322 (b)(2) prohibits modification of any rights

of a "holder" of ...a claim secured by a security interest in real property that is the debtor's principle residence." 11 U.S.C. Section 1322(b)(2). As the Court in In re Catlin stated:

> It seems that many courts (and Colliers) have taken relatively simple straight - forward statutes and tortured them with overly complex (and in some cases perverse) analysis. In this Court's opinion, the proper judicial resolution of the issue lies in the disciplined application of statutes according to what they plainly mean.

81 B.R. 522, 527 (Bankr. D. Minn. 1987).

Applying the plain language of Section 1322(b)(2) would not make it inconsistent with Section 506 of the Bankruptcy Code. Section 506(a) states only that an allowed claim is a secured claim to the extent of the value of the creditors' collateral, and an unsecured claim to the extent that the claim exceeds the value. Section 506(a) does not purport to determine the creditors right to receive payment of its claim or the extent to which a creditors rights may be modified under the Plan. In re Simpkins 16 B.R. 956, 965 (Bankr. E.D. Tenn. 1982) (Section 506 does not determine the right to payment, but only whether a claim is secured or unsecured.) These matters are specifically provided for elsewhere in the Bankruptcy Code. See, e.g., 11 U.S.C. Section 1129(b)(2); and Section 1322(b)(2).

A second principal of statutory construction applies to demonstrate the absence of any apparent inconsistency between Section 1322(b)(2) and 506(a): "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to matters specifically dealt with in other parts of the same enactment." D. Ginsberg & Sons v. Popkin, 285 U.S. 204, 208, 52 S. Ct. 322, 76 L. Ed. 704 (1932). The structure of the Bankruptcy Code clearly shows that the specific language of Section 1322 is applicable to cases under Chapter 13, while Section 506(a) is a general provision which, thus, should be held not to apply.

> What the Hougland Court did not seem to appreciate, is that we are dealing with general and specific concepts that are intended to apply to, and govern, the rights of debtors and their creditors in different situations, and with different applications, depending upon particular code purposes to be served. The application of general concepts is not universal in the scheme of the Code, but is subject to specific limitation, and even total disregard, in some instances. Thus, the general definition of "secured claim" in Section 506(a), for instance, has no application to a creditor who has made an election under Section 1111(b) in connection with a Chapter 11 case.

In re Sauber, 115 B.R. 197, 199 (Bankr. D. Minn. 1990). Also,

in In re Mahaner, 34 B.R. 308 (Bankr. W.D.N.Y. 1983), the court held that Section 506(a) has no application under Chapter 7 where the debtor seeks to pay off the secured interest and redeem the property. A contrary interpretation would render Section 722 of the Bankruptcy Code, which provides for redemption for certain tangible personal property in Chapter 7 cases, mere surplusage.

C. The Legislative History of 11 U.S.C. Section 1322(b)(2) Confirms that Home Mortgage Lenders are Entitled to Protection of the Entire Amount of the Indebtedness.

Interpreting Section 1322(b)(2) so that it protects the entire amount of a residential mortgage lender's claim is mandated by the legislative history of that section. "It is clear that Congress intended special treatment for a creditor whose claim is secured only by a security interest in the Debtor's principal residence." In re Schum, 112 B.R. 159, 162 (Bankr. N.D. Tex. 1990). This "special treatment" was discussed at the time of the adoption of the current code. Under Chapter XIII of the Bankruptcy Act of 1898, the statutory predecessor of Chapter 13, an individual wage earner's reorganization plan could not "deal with" (i.e., modify or otherwise affect) the rights of any creditor holding a

claim secured by real property. The basis for this conclusion is that Chapter XIII of the 1898 Act expressly excluded from the definition of "claims" a "claim secured by estates in real property or chattels real." Bankruptcy Act of 1898, Pub. L. No. 61., 30 Stat. 544-66 (repealed 1978), Section 606(1); See In re Kaczmarczyk, 107 B.R. 200, 202-203 (Bankr. D. Nev. 1989).

In Grubbs v. Houston First American Savings Assn., 730 F.2d 236 (5th Cir. 1984), the Court noted that the original bill introduced into the House provided that a Plan may "modify the rights of holders of secured claims or of holders of unsecured claims..." 730 F.2d at 243. By contrast, the draft submitted by the Bankruptcy Commission (which formed the basis of the House bill) provided that the Plan:

> (2) may include provisions dealing with claims secured by personal property severally, on any terms, and may provide for the curing of defaults within a reasonable time and otherwise alter or modify the rights of the holders of such claims.
>
> ***
>
> (4) may include provisions for the curing of any default within a reasonable time and maintenance of payments while the case is pending on claims secured by the debtor's residence and on unsecured claims or claims

> secured by personal property on which the last payment is due after completion by the debtor of all payments under the plan.

Id. at 244. The Bankruptcy commission's explanatory note to clause 4 stated that the provision granted "a limited authority to deal with claims secured by a lien on the debtor's residence. Id.

Subsequently a Senate Subcommittee was convened to address the Senate version of the Bill. In hearings, witnesses for secured creditors appeared and objected to the provisions "that permitted reduction of the secured amount of the claim to the value of the collateral." Id. at 245 (citing Hearings Before the Subcommittee on Improvements of the Judicial Machinery of the Senate Committee on Judiciary, 95th Cong., 1st Sess. (1977)).

At the Senate hearings, Edward J. Kulik, Senior Vice President, Real Estate Division of Massachusetts Life Insurance Company, appeared as a witness. Mr. Kulik pointed out that the negative impact of "cram-downs" was of particular concern to real estate lenders:

> The proposed Chapter 13 [provision] in both bills, providing for the adjustment of debts of an individual with regular income, includes two fairly significant changes, compared to existing law, that may have the unintended

> effect of restricting the flow of home mortgage money.
>
> First, similar to the situation discussed previously in the commercial context, the holder of a mortgage on real estate may be forced to give up its specific security in return for some other property of uncertain value.
>
> Second, the stay of actions by the creditor protects not only the individual debtor under Chapter 13 but any guarantor or other codebtor as well.
>
> These provisions may cause residential mortgage lenders to be extraordinarily conservative in making loans in cases where the general financial resources of the individual borrower are not particularly strong.
>
> Serious consideration should be given to modifying both bills so that, at the least: one, a mortgage on real property other than investment property may not be modified, and two, providing that the stay of actions against a guarantor or other codebtor is applicable only to guarantees executed after the effective day of the new legislation.

Hearings Before the Subcommittee on Improvements of the Judicial Machinery of the Committee on the Judiciary, United States Senate, 95th Cong., 1st Sess. (1977), p. 714 (emphasis added).

Mr. Kulik's reference to changes from existing law included in "both bills" can be explained by the fact that the Senate bill (but not the House bill) contained the co-debtor stay provision that Mr. Kulik discussed.

The intent of Section 1322 (b)(2) must be derived by looking at the information before Congress when it passed the current version of Section 1322(b)(2).

The intent of this provision is explained in the joint explanatory statement agreed on by the House and Senate Floor Managers, published by each in the Congressional Record following the floor debates on the compromise bill:

> Section 1322(b)(2) of the House amendment represents a compromised agreement between similar provisions in the House bill and Senate amendment. Under the House amendment, the plan may modify the rights of holders of secured claims other than a claim secured by a security interest in real property that is the debtor's principal residence. It is intended that a claim secured by the debtor's principal residence may be treated under Section 1322(b)(5) of the house Amendment.

124 Cong. Rec. H32340 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards); 124 Cong. Rec. S33989 (daily ed. Oct. 5, 1978) (statement of Sec. DeConcini).

The language of Section 1322(b)(2), as enacted, and its legislative history, clearly demonstrates that the intent of this section is to preserve the availability of residential mortgage funding for individuals of modest means by prohibiting any modification of the claims of residential mortgage lenders. The sole exception to this is the treatment expressly authorized by Section 1322(b)(5), which allows the curing of any default under a residential mortgage "within a reasonable time." 11 U.S.C. Section 1322(b)(5). Nowhere in the legislative history is there any suggestion that the statute, as finally enacted, was intended to permit a residential mortgage lender to be "crammed-down" to the appraised value of the collateral; indeed, this is exactly the type of modification of rights about which Mr. Kulik expressed concern, and which the compromise legislation was intended to prevent.

II. THE REASONING SUPPORTING THE COURT'S OPINION IN DEWSNUP V. TIMM COMPELS A CONCLUSION THAT BIFURCATION UNDER SECTION 1322(b)(2) IS IMPERMISSIBLE.

In Dewsnup v. Timm, ___U.S.___, 112 S.Ct. 773, 116 L.Ed.2d. 903, (1992), this Court denied a Chapter 7 debtor the

right to "strip-down" a creditor's lien by refusing to allow the debtor to use Section 506(d) to "redeem" real property by paying the secured creditor the current fair market value of the property. The debtor owed approximately $120,000 and the fair market value of the land securing the debt was judicially determined to be $39,000. The Supreme Court did not allow the debtor to use Section 506(a) and (d) to strip-down the value of the lien. The Dewsnup Court limited its holding to the facts of the case before it, though, because of the ambiguities between Section 506 and other provisions in the Bankruptcy Code. Dewsnup, 116 L.Ed. 2d at 910-911.

In Dewsnup, this Court recognized that historically "liens on real property pass through bankruptcy unaffected". Id. at 911. "Apart from reorganization proceedings, ... no provision of the pre-Code Statute permitted involuntary reduction of the amount of a creditor's lien for any reason other than payment on the debt". Id. at 912. The absence of any legislative history expressing any intent to "grant a debtor the broad new remedy against allowed claims to the extent that they become 'unsecured' for purposes of Section 506(a) without the new remedy's [sic] being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, [to the Supreme Court], and

is contrary to basic bankruptcy principles." Id. at 913.

Although Dewsnup dealt with a Chapter 7 Debtor, the rationale is entirely applicable to a chapter 13 Debtor, as noted in one post-Dewsnup decision:

> [T]he United States Supreme Court decided a closely related question: it held that a debtor in Chapter 7 may not "strip-down" a creditor's lien on real property to the value of the collateral, as judicially determined, when that value is less than the amount of the claim secured by the lien . . . . Although the court deliberately refrained from deciding whether a debtor in Chapter 13 could do what the court held could not be done in Chapter 7 it is almost impossible to reconcile the decision's rationale with any different result in Chapter 13.

In re Strober; 136 B.R. 614 (Bankr. E.D.N.Y. 1992).

The Strober case combined the cases of two debtors who wished to strip the value of the liens on their principal residence to the fair market value. In denying the lien stripping, the Strober court recognized that "the authority of the decisions which have read Section 506 as limiting the protection given home mortgagees by Section 1322(b)(2) against cram down has been weakened, if not demolished by Dewsnup. . . ." Id. As in Dewsnup, the Strober court found little warrant "for attributing an intention to Congress to allow liens to be avoided in Chapter 13, to the extent that they become 'unsecured' for the purposes

of Section 506(a), when Chapter 13 contains an explicit prohibition against modification of a claim secured only by a security interest in real property that is the debtor's principal residence. 11 U.S.C. Section 1322(b)(2). The annals of Congress reveal that this explicit prohibition was crafted to block a debtor from voiding the mortgage on his home to the extent it becomes 'unsecured.'" Id.; See also In re Ireland, 137 B.R. 65 (Bankr. M.D. Fla. 1992) (held that a debtor may not bifurcate a lien secured by the principal residence in a Chapter 13 case because of the specific directive of Section 1322(b)(2)); Matter of Davidoff, 136 B.R. 567 (Bankr. M.D. Fla. 1992) (holding that Section 506 is applicable in Chapter 13 cases but is limited by the specific language of Section 1322(b)(2)).

The United States Supreme Court's opinion in Dewsnup and Grubbs v. Houston First American Savings Assn., 730 F.2d 236 (5th Cir. 1984), a leading opinion from the Fifth Circuit is consistent in the interpretation of the meaning of section 1322(b)(2). After a thorough analysis of the events surrounding the enactment of Section 1322(b)(2), the Fifth Circuit concluded that Congress intended to prohibit "cram-downs" of mortgages covering a debtor's principal residence:

> With regard to Section 1322(b)(2), the Senate receded from its position that no "modification" was to be permitted of any mortgage secured by real estate; it instead agreed to a provision that modification was to be barred only as to a claim "secured only by a security interest in real property that is the debtor's principal residence." This limited bar was apparently in response to perceptions, or to suggestions advanced in the legislative hearings . . . that, home mortgagor lenders, performing a valuable social service through their loans, needed special protection against modification thereof (i.e., reducing installment payments, secured valuations, etc.).

730 F.2d at 246 (emphasis in original).

The Grubbs Court was referring to Senate hearings held before the Subcommittee on Improvements of the Judicial Machinery of the Senate Committee on the Judiciary, 95th Cong., 1st Sess. (1977). During those hearings, various representatives of the mortgage banking industry testified regarding the negative impact modification of mortgages would have on their industry. After those hearings, the Senate made one amendment to the proposed version of Section 1322(b), allowing the plan to "modify the rights of holders of secured claims (other than claims wholly secured by mortgages on real property) or of holders of unsecured claims." Grubbs, supra, at n.14

(underlined text indicates content of the amendment); see also Hearings Before the Subcommittee on Improvements of the Judicial Machinery of the Committee on the Judiciary, United States Senate, 95th Cong. 1st Sess. (1977) p. 714. The version of Section 1322 (b)(2) that was finally enacted limited the Senate's proposed amendment to mortgages secured only by real property that is the debtor's principal residence.

III. BIFURCATION OF A HOME MORTGAGE LENDER'S CLAIM WILL RESULT IN A DIMINUTION OF THE AVAILABILITY OF RESIDENTIAL MORTGAGE FUNDING FOR INDIVIDUALS OF MODERATE MEANS.

The issue of housing for all individuals and families is of critical importance today. Congress has expressed its unwavering intent to provide housing for low and moderate income families. This intent is manifest in the programs that make federally insured mortgages available to individuals and families. Congressional concerns with housing issues are addressed by the National Housing Act. Under this Act, mortgage lenders have the added protection of federal insurance on the loans made pursuant thereto. If this Court were to hold that debtors can

cram-down a lien that secures the home mortgage, the entire structure of the federally insured mortgage program would be adversely altered. The Bankruptcy Code provisions should not be interpreted in a manner that would void the effect of the Act. No reported decision discusses the interrelationship of the National Housing Act with the Bankruptcy Code, nor have any courts utilized federal non-bankruptcy law as a tool to assist in the interpretation of the Bankruptcy Code. However, as the United States Supreme Court noted in Ruckelshaus v. Monsanto Co., 467 U.S. 986, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984), where two statutes are capable of "co-existence, it is the duty of the Courts, absent a clearly expressed Congressional intention to the contrary, to regard each as effective." 104 S. Ct. at 2881 (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102 133-134, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974) and Morton v. Mancari, 417 U.S. 535, 551 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)).

"The Federal Housing Administration was established to encourage improvement in housing standards and conditions, to provide an adequate home financing system by insurance of housing mortgages and credit, and to exert a stabilizing influence on the mortgage market." 24 C.F.R. Section 200.3. In

order to carry out its directive, the FHA, an organizational unit within HUD, created the Federal Insurance program. The program provides a vehicle by which people of low and moderate incomes can purchase homes. Under the FHA insurance program, (the establishment and scope of the FHA is described at 24 C.F.R. 200.1, et. seq. The FHA insurance program appears at 24 C.F.R. 201.1, et. seq.), the obligation owed to the lender is essentially insured for the amount of the entire indebtedness by the FHA. If the mortgagor defaults on his obligation, the lender ultimately forecloses and conveys title to HUD. HUD then pays the balance of the outstanding indebtedness to the lender. Thus, the lender is assured of recovery, either through payment of the promissory note by the mortgagor or through a payoff by HUD under the FHA insurance. An adverse ruling would unravel the structure of the FHA program and, even under the most optimistic construction, significantly increase its costs. Under the current structure, a bifurcation and "cram down" destroys the protection of the insurance.

The legislative intent is clear in the National Housing Act: Congress obviously intended to provide adequate housing for low and moderate income families. However, the proper interpretation of 11 U.S.C. Section 1322 apparently is not

equally clear in that the courts are split in their interpretation of that bankruptcy code section. Therefore, under Ruckelshaus, this Court should look to the intent of the two Congressional enactments to determine a proper interpretation. Congress certainly would not provide with one hand a means by which credit would be made available under the National Housing Act and with the other hand remove that Act's effectiveness by taking away the inducement for mortgage lenders to participate in the federal insured loan programs. See Watt v. Alaska, 451 U.S. 259, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981). There is no doubt that the cram-down phenomenon, in and of itself, takes away an important inducement for mortgage lenders to participate in the federal insured loan program. The judicial interpretation of 11 U.S.C. Section 1322 that permits cram-downs, therefore, drastically limits the effectiveness of the National Housing Act.

The clearly stated intent of the National Housing Act demonstrates that Congress intended to make housing available to low and moderate income families by inducing lenders to make home loans that they would not otherwise make. The inducement provided was Federal insurance. To interpret the Bankruptcy Code in a way that removes this inducement will nullify

a significant aspect of the National Housing Act in that lenders will be far less willing to participate in the absence of the protection of Federal insurance.

IV. CONCLUSION

For the foregoing reasons, this Honorable Supreme Court should hold that bifurcation of home mortgages is not permitted by section 1322(b)(2) and affirm the decisions of the courts below. Respectfully submitted,

Michael C. Barrett*

Mary A. Daffin
G. Tommy Bastian
6750 Hillcrest Plaza Dr.
Suite 313
Dallas, Texas 75230
(214) 386-5040

Erin Baker Shank
NationsBank of Texas
1201 Main Street, 29th Floor
Dallas, Texas 75202

Caren Castle
Audie Hampton
1099 18th Street Suite 2200
Denver, Colorado 80202
(303) 299-1800

Attorneys for Amicus Curiae
NationsBanc Mortgage Corporation